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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-834

ROSALIND McCLANAHAN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

ARIZONA STATE TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of Arizona denying review (J.S. App. A) is not reported. The opinion of the Arizona Court of Appeals (J.S. App. B) is reported at 14 Ariz. App. 452, 484 P. 2d 221. The opinion of the Arizona Superior Court (J.S. App. C) is unreported.

JURISDICTION

The Supreme Court of Arizona entered final judgment denying review on September 21, 1971 (J.S. App. 1a). Notice of appeal was filed on October 4, 1971 (J.S. 6). On May 15, 1972, this Court noted probable jurisdiction. This Court's jurisdiction rests on 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether the State of Arizona has jurisdiction to tax the income of Navajo Indians who reside on the Navajo Reservation and whose income is earned on the Reservation.

INTEREST OF THE UNITED STATES

By order of February 22, 1972, the Court invited the Solicitor General to express the views of the United States in this case. Because of its treaty obligations to Indian Tribes and its fiduciary relationship to reservation Indians, and in light of the extensive federal legislation relating to Indian taxation, providing funds for Indian economic development, and fostering tribal self-government, the United States is concerned about extensions of state taxation to Indians on reservations without congressional consent.

STATEMENT

Rosalind McClanahan is an enrolled member of the Navajo Tribe of Indians. At all pertinent times she resided within the portion of the Navajo Indian Res-

ervation located in the State of Arizona. Her income was "derived from sources within the confines of the Navajo Indian reservation" (J.S. App. B, pp. 2a-3a). Her employer withheld a portion of her income which was turned over to the State of Arizona under its income tax laws.

Appellant filed an Arizona state individual tax return and a written protest claiming a right to a refund of the entire sum withheld from her wages on the ground that Arizona had no right to tax her income. After an unsuccessful administrative appeal, she brought this class action in Apache County, Arizona, on behalf of herself and all others similarly situated seeking a refund of the taxes withheld by her employer (J.S., pp. 4-5; App. B, pp. 2a-3a). The County Court dismissed the action (J.S. App. B, p. 3a). On appeal, the Court of Appeals of the State of Arizona affirmed the judgment of the trial court in a written opinion (J.S. App. B). The appellate court held that state personal income taxation of Indians on reservations is permissible because it does not adversely affect tribal interests or impair tribal self-government. The Supreme Court of Arizona denied appellant's subsequent petition for review (J.S. App. A). Appellant then appealed to this Court, which noted probable jurisdiction on May 15, 1972.

SUMMARY OF ARGUMENT

The federal government's exercise of its constitutional powers with respect to Indians has resulted in substantial federal pre-emption of the regulation of

Indian affairs. This Court has consistently held that with narrow exceptions applicable primarily to non-Indians, state laws including state tax laws can have no effect within an Indian Reservation in the absence of specific authorization by Congress.

Congress has consistently acted on the assumption that in the absence of its express authorization the States have no power to regulate or tax Indians on a reservation. When Congress has determined that a State should have more extensive jurisdiction over a particular reservation within its boundaries it has passed specific legislation to this effect. Congress has never granted jurisdiction to the State of Arizona over the Navajo Reservation. Moreover, when Arizona, under general legislation, had the opportunity to assume broad jurisdiction over the reservation it did not choose to do so.

Similarly, when Congress has wished to enable the States to tax within Indian reservations, it has expressed this intent through specific legislation. For example, Congress has permitted the taxation of mineral production on unallotted tribal lands, but with particular safeguards. And when Congress permitted the States to impose income taxes on persons residing in federal areas, it specifically exempted Indians.

It is particularly clear that the Indians on the Navajo Reservation are not subject to taxation by Arizona. The Navajo Reservation was established before Arizona was admitted to the Union. When that State was admitted, it was under the express condition that it disclaim all right and title to Indian lands includ-

ing the Navajo Reservation and that such lands would remain under the control and jurisdiction of the Congress of the United States. Congress has consistently exercised control over the Navajo reservation, has spent large sums of money on the reservation and has subsidized the State of Arizona with the understanding that Arizona does not have jurisdiction to tax Indians residing on the reservation. Congress' action in this respect has been consistent, deliberate and equitable, and leaves no room for state taxation without congressional consent.

ARGUMENT

I

Decisions Of This Court Establish That With Narrow Exceptions State Laws Including State Tax Laws May Not Be Applied Within An Indian Reservation, Except As Specifically Authorized By Congress

The federal government's exercise of its constitutional powers with respect to Indians—including the treaty power, the war power, dominion over public lands, and the power to regulate commerce with the Indians[1]—has resulted in substantial federal preemption of the regulation of Indian affairs. In 1832 in *Worcester* v. *Georgia*, 6 Pet. 515, this Court held broadly that the laws of Georgia could have no force within the Cherokee Reservation located in that State. Speaking through Chief Justice Marshall, the Court

[1] For a discussion of these powers in the context of Indian law, see generally U.S. Department of the Interior, *Federal Indian Law* (Cohen, 1956 rev.) pp. 21-47.

stated that "[t]he whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States" (*id.* at 561), and described the Tribe as "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force * * *" (*ibid.*). The principle of *Worcester* remains today a basic underpinning of Indian self-government and an important premise for federal programs designed to strengthen tribal government and to foster economic development within Indian reservations.

Decisions subsequent to *Worcester* have established that the States may exercise jurisdiction over certain exclusively non-Indian activities occurring on a reservation. *United States* v. *McBratney*, 104 U.S. 621 (service of process on non-Indian living within reservation); *Draper* v. *United States*, 164 U.S. 240 (murder on reservation of one non-Indian by another non-Indian); *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28 (state taxation of portion of railroad running through reservation on land ceded to the railroad). But these are narrow exceptions to *Worcester* concerning matters not directly affecting the Indians who reside on the reservation. No decision of this Court authorizes state regulation or taxation of Indians on reservations, in the absence of congressional authorization.

Indeed, reasoning similar to that of *Worcester* was applied to state taxation by this Court some thirty years later in striking down an attempt by the State of Kansas to tax reservation lands held in severalty

by individual Indians. *The Kansas Indians*, 5 Wall. 737. See also *The New York Indians*, 5 Wall. 761. In so holding the Court emphasized the disclaimer of jurisdiction by Kansas when it entered the Union (5 Wall. 756-757) and the Tribe's maintenance of its customs, laws and tribal organization (*ibid.*).[2] The Court refused to separate, for purposes of state taxation, the interests of individual Indians from those of the Tribe. As with state jurisdiction in general, narrow exceptions have been developed which in certain circumstances permit state taxation within Indian reservations, but only of interests of non-Indians. *Thomas* v. *Gay*, 169 U.S. 264 (upholding an Oklahoma territorial tax on the cattle of non-Indian lessees of reservation land); see also *Maricopa & Phoenix Railroad* v. *Arizona Territory*, 156 U.S. 347; *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28.

It has, in sum, long been hornbook law that in the absence of specific authorization by Congress state regulation or taxation of Indians on reservations is not permitted:

> * * * State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian Reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress. Conversely Indian property outside of

[2] Although Indians are now citizens of the United States and thus of the States in which they live, the reasoning of the Court in *Kansas Indians* remains fully applicable to reservation Indians who maintain their tribal structure and continue under un-terminated federal supervision.

> an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found.* * * [citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651].*

The Court of Appeals of Arizona in the present case has attempted to broaden greatly the applicability of state law within the Navajo Reservation by interpreting language in *Williams* v. *Lee*, 358 U.S. 217, and subsequent cases as authorizing the application of state law directly to reservation Indians, so long as tribal government is not destroyed. The Arizona court thus held that the State may impose its income tax on reservation Indians without their consent or the consent of Congress. J.S. App. 4a-10a. We submit that this is a misinterpretation of this Court's decisions—a misinterpretation that would deprive the tribes of a substantial part of the independence that federal treaty obligations, law and policy have enabled them to preserve.

Indeed, *Williams* and subsequent decisions of this Court have reaffirmed that in the absence of congressional authorization, state laws generally may not be applied to reservation Indians. And, specifically, there is nothing in this Court's decisions that permits the application of state tax laws to reservation Indians without express congressional authorization.

In *Williams*, this Court, reversing the Supreme Court of Arizona, held that Arizona courts have no jurisdiction to hear suits by non-Indians against Indians who live on the Navajo Reservation, and that

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*U.S. Department of the Interior, *Federal Indian Law* (Cohen, 1956 rev.) 845-846.

such suits can be brought only in tribal courts. In an opinion which reviewed in detail the law concerning state jurisdiction over Indian reservations, the Court quoted with approval from *Worcester* and stated that the only exceptions to the *Worcester* principle of the inapplicability of state law to reservation Indians have been "in cases where essential tribal relations were not involved *and where the rights of Indians would not be jeopardized* * * *." 358 U.S. at 219 (emphasis added). The Court gave as examples of these exceptions the jurisdiction of state courts to hear suits by Indians against non-Indians and the jurisdiction of state courts to try non-Indians for crimes committed on reservations against other non-Indians. *Id.* at 219-220. In describing these exceptions and their limitations, the Court stated, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. The Court pointed out that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Id.* at 220. It noted, finally, that "No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos." *Id.* at 221. Indeed, the Court held, "Congress recognized * * * authority in the Navajos [to govern their reservation] in the Treaty of 1868, and has done so ever since." *Id.* at 223.

Kake Village v. *Egan*, 369 U.S. 60, did not modify the general principle that state law is inapplicable to Indians on reservations. In *Kake* two communities of Alaskan Indians who had never been provided with a reservation claimed that by their status as Indians and under the legislation admitting Alaska into the Union they were free to operate fish traps contrary to Alaska law. They relied upon language in the Alaska Statehood Act providing among other things that the United States retains "absolute jurisdiction and control" over Indian property. *Id.* at 67. The Court pointed out that despite the language in the Statehood Act the State of Alaska had been granted civil and criminal jurisdiction over all Indian country in the State by an Act of Congress in 1958, 72 Stat. 545. The Court also relied heavily on the legislative history of the Alaska Statehood Act, 369 U.S. at 67-69.

While this Court's opinion in *Kake* emphasizes congressional Acts and judicial decisions permitting certain state regulatory activities within Indian reservations, the decisions of this Court cited as examples of state law applying on Indian reservations over which the states have not been granted general criminal and civil jurisdiction are only those which we cite on page 6 *supra*, none of which directly affect Indians living on the reservation. Moreover, *Kake* cites *Williams* with approval (*id.* at 74), and does not purport to modify it. And, significantly, in a companion case, *Metlakatla Indians* v. *Egan*, 369 U.S. 45, where the Indians lived on a reservation

established by Congress, the Court upheld the Secretary of the Interior's exclusive jurisdiction (other than tribal and, of course, congressional jurisdiction) over fishing within the reservation.

Finally, in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, decided three years after *Kake* and *Metlakatla*, this Court in effect reaffirmed the continuing vitality of the *Worcester-Kansas Indians* principle in striking down an attempt by the State of Arizona to impose a tax of 2 percent on the gross proceeds of sales of a retail business owned by non-Indians and located on the Navajo Reservation. The main emphasis of the opinion was on the extensive history of federal regulation of trade with the Indians. *Id.* at 688-690. But this was not the sole rationale of the decision. The Court also relied on the federal government's long standing policy of "permitting the Indians largely to govern themselves, free from state interference," *id.* at 686-687, see also 690-691, and articulated the restricted range for exceptions to the rule as consisting only of "laws * * * specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations." *Id.* at 687 n. 3.

In light of this legal background, we submit that the attempt of the Arizona Court of Appeals in the present case to separate, for purposes of state taxation, the interests of reservation Indians as individuals from the interests of the tribe itself (J.S. App. 6a)—directly contrary to this Court's *Kansas Indians* decision, *supra*—was unwarranted. And, to the

extent that the decision below is based on interpretation out of context of particular language in *Williams*, *Kake* and *Warren Trading Post* to justify state taxation of Indians on a reservation (see J.S. App. 5a, 7a-8a), the Arizona court has misconstrued these cases. The rule has been and should remain that state law applies within a reservation only where clearly authorized by Congress or in limited situations where the effect of applying the laws within a reservation is on non-Indians alone. This Court has appropriately implemented federal law and policy in this area by requiring a State which seeks broader jurisdiction over reservations within its borders to bear the burden of convincing Congress, which has legislated extensively in this area, that such jurisdiction is warranted.

Moreover, as this Court pointed out in *Williams*, 358 U.S. at 222-223, Arizona did not choose to assume civil and criminal jurisdiction over the Navajo reservation when Congress offered it the opportunity to do so (see pp. 14-15 *infra*). While the presence of civil and criminal jurisdiction over a reservation is not synonymous with a power to tax (see our memorandum in *Tonasket* v. *The State of Washington*, No. 71-1031, probable jurisdiction noted, June 12, 1972,) without such jurisdiction, taxation, other than in most limited circumstances, is extremely awkward.

> Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the State by action taken within its borders,

> either *in personam* or *in rem* according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture of franchise or the like * * *.

Shaffer v. *Carter*, 252 U.S. 37, 49, 50, 52. See also *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80-81. Without general jurisdiction, State taxation should be permitted only where Congress has acted, thus giving Congress the opportunity of weighing alternative sources of state revenue (see pp. 17-18) and of designing its legislation so as to minimize procedural difficulties.

II

Congress Has Consistently Acted On The Assumption That In The Absence Of Its Express Authorization, The States Have No Power To Regulate Or Tax Indians On A Reservation

As this Court pointed out in *Williams*, "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." 358 U.S. at 220. When Congress has wished to permit the States to exercise jurisdiction within Indian reservations, it has done so by particular statutes. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423. For example, Congress granted certain States plenary jurisdiction over specified tribes by "termination" legislation enacted in the 1950's,[4] but did not terminate its guardian-

[4] Klamath Tribe, 25 U.S.C. 564-564x; "mixed blood" Ute Indians, 25 U.S.C. 677-677aa; "Western Oregon" Indians, 25

ship over the Navajo Tribe. And Congress, through Public Law 280, Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C. 1360 specifically delegated to some States (but not Arizona, New Mexico or Utah—the States in which the Navajo Reservation lies) civil and criminal jurisdiction over Indian reservations within their borders. Public Law 280 also initially provided a method by which any State which took specific steps to do so could bring reservation Indians within the jurisdiction of its criminal and civil courts without the consent of the tribes affected. In the Indian Civil Rights Act of 1968, however, Congress, responding to strong objections to the involuntary features of Public Law 280, amended it in the interest of Indian self-government, to require the carefully expressed consent of the enrolled Indians living within a reservation before a State can assume jurisdiction within the reservation, and to permit retrocession of state jurisdiction acquired under the earlier law. Act of April 11, 1968, Title IV, 82 Stat. 78, 25 U.S.C. 1321, *et seq.* See *Kennerly* v. *District Court of Montana*, *supra*. During the interval between the passage of P.L. 280 and its amendment, neither Arizona, New Mexico, nor Utah chose to assume general civil and

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U.S.C. 691-708; Alabama and Coushatta Indians of Texas, 25 U.S.C. 721-728; Paiute Indians of Utah, 25 U.S.C. 741-760; Wyandotte Tribe of Oklahoma, 25 U.S.C. 791-807; Peoria Tribe of Oklahoma, 25 U.S.C. 821-826; Ottawa Tribe of Oklahoma, 25 U.S.C. 841-853; Menominee Tribe of Wisconsin, 25 U.S.C. 891-902; Ponca Tribe of Nebraska, 25 U.S.C. 971-980; California rancherias, 72 Stat. 619, amended by 78 Stat. 390.

criminal jurisdiction over the Navajo Reservation. See *Williams* v. *Lee*, 358 U.S. 217, 222-223.[5]

In taxation, as in other matters, when Congress has wished to confer on the States jurisdiction over reservation Indians, it has done so by carefully delimited legislation. Thus 25 U.S.C. 398 specifically authorizes the States to tax mineral production on unallotted tribal land, but also provides that the tax shall not become a lien or charge of any kind against the land or the property of the Indian owner. And 4 U.S.C. 105-109 (the Buck Act), which among other things permits the States to impose income taxes on persons "residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 105, 106), specifically exempts "Indians not otherwise taxed" from the operation of the Act (4 U.S.C. 109), and contains other safeguards of federal jurisdiction (4 U.S.C. 108). See also *Warren Trading Post*, *supra*, 380 U.S. at 691.

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[5] Arizona did, during this interval, enact two statutes asserting jurisdiction over "Indian tribal lands, reservations and allotments" for the enforcement of air and water pollution legislation. Laws of 1967, Ch. 2, Sec. 10, 36 Ariz. R.S. (Cum. Supp.) § 1801; Laws of 1967, Ch. 106, Sec. 2, 36 Ariz. R.S. (Cum. Supp.) § 1865. These statutes are far less than a full assumption of civil and criminal jurisdiction under P.L. 280. Moreover, such partial assumptions are of doubtful validity under the 1953 Act. In other particular contexts, such as health, education and liquor control, Congress has authorized application of state law on Indian reservations under specified conditions (see *Warren Trading Post*, *supra*, 380 U.S. at 687 n. 3).

Congress has passed no law which directly or by implication authorizes state taxation of income earned by Indians within the Navajo Reservation.

III

The History Of The Navajos, The United States, And Arizona Concerning This Reservation Is Inconsistent With Arizona's Asserted Right Of Taxation

The Navajo Indian Reservation was established by a treaty concluded between the United States and the Navajo Tribe on June 1, 1868 (15 Stat. 667). The Reservation included lands in the present States of Arizona, New Mexico and Utah. The treaty established peace between the United States and the Navajos and took from the Navajos most of what had been their native country, but reserved for them a part of their former lands as "their permanent home". The treaty also provided that no one except United States Government personnel and persons authorized by the Indians could enter the reservation. *Id.* at 668, Art. II. See *Williams* v. *Lee*, *supra*, 358 U.S. at 220-223 (quoted in part at p. 9, *supra*).

More than 40 years after the establishment of the Navajo Reservation, Arizona was admitted to the Union under the express condition that the people inhabiting the proposed State:

> forever disclaim all right and title to * * * all lands * * * owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall

have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. * * *

36 Stat. 569. The Arizona Constitution contains substantially identical language (Art. 20, para. 4), as do the enabling acts and Constitutions of New Mexico and Utah where other parts of the reservation are located.[6]

The United States has acted consistently on the assumption that Arizona has no jurisdiction over Indians within this reservation. Indeed, in 1949, President Truman vetoed a precursor of the Navajo-Hopi Rehabilitation Act which would have extended to the States in which the reservation is located concurrent jurisdiction over the reservation.[7] The President's veto message noted that the bill's "only objectional provisions are those * * * which, with some qualifications, extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under federal and tribal laws and courts." H. Rep. No. 1474, 81st Cong., 2d Sess., p. 6. This

[6] New Mexico Enabling Act, Sec. 2, Part 2, 36 Stat. 558-559; New Mexico Constitution of 1911, Article 21, Section 2; Utah Enabling Act, Sec. 3, part 2, 28 Stat. 108; Constitution of Utah, Art. III, Sec. 2. The Supreme Court of New Mexico in a comprehensive opinion denied the jurisdiction of New Mexico to tax within a reservation. See *Your Food Stores, Inc.* v. *Village of Espanola*, 68 N.M. 327, 361 P. 2d 950. This case was cited with approval in *Warren Trading Post*, *supra*, 380 U.S. at 691 n. 18. But see *Ghahate* v. *Bureau of Revenue*, 80 N.M. 98, 451 P. 2d 1002.

[7] The Hopi Reservation is located within the confines of the Navajo Reservation.

provision, which at least arguably could have provided the basis for state taxation within the Navajo Reservation, was eliminated from the Navajo-Hopi Rehabilitation Act enacted in 1950, 64 Stat. 44, 25 U.S.C. 631 *et seq.* In the Rehabilitation Act as passed in 1950, Congress added a major subsidy to the States of Arizona, New Mexico and Utah to defray 80 percent of the States' ordinary share of Social Security payments to Indians living on the Navajo Reservation, 25 U.S.C. 639. Congress also authorized the expenditure of more than $88,000,000 for a major rehabilitation program for the Navajos and Hopis living on the reservation. 64 Stat. 45. Under the Rehabilitation Act and subsequent authorizations and appropriations, the Bureau of Indian Affairs alone (thus excluding expenditures for Indian health services and other federal services provided to the general public) has made the following expenditures on the Navajo Reservation in selected typical years:[8]

1950	$10,280,000
1955	19,275,000
1960	32,220,000
1965	47,657,000
1970	63,236,000
1971	87,144,000

We do not argue that tax jurisdiction depends upon relative expenditures. As to state jurisdiction within Indian reservations, it depends upon congressional

[8] The figures were supplied to us by the Bureau of Indian Affairs.

authorization. We mention these expenditures and this legislative history, however, to show that the conclusion that Arizona is not permitted to tax Indians within the Navajo Reservation (except as to mineral production) is supported by a consistent, deliberate, and equitable pattern of congressional conduct, as well as by the decisions of this Court previously discussed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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